South Africa
Minority Shareholder Rights
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SOURCES OF PROTECTION AND ENFORCEMENT

Please provide an overview of the sources of protection for minority shareholders in your jurisdiction. Who enforces these rights?

The laws of the Republic of South Africa provide various protections to minority shareholders. The South African Companies Act 71 of 2008 (the Companies Act) is the main source of company law in South Africa which contains the majority of protections afforded to minorities. Some of these protections are contained in alterable provisions of the Companies Act the application of which may be amended and/or modified in the company's memorandum of incorporation (MOI), its constitutional document. The Companies Act must therefore always be considered alongside the constitutive documents of the company in question. The main regulatory authorities under the Companies Act include the Companies and Intellectual Property Commission (CIPC), which is tasked with the widest possible enforcement of the Companies Act (including receiving, initiating and investigating complaints concerning alleged contraventions of the Companies Act), the Companies Tribunal and the Takeover Regulation Panel (discussed below).

Parts B and C of Chapter 5 of the Companies Act, read together with the Companies Regulations 2011 promulgated thereunder (the Takeover Regulations), regulates takeovers and other affected transactions in general. The Takeover Regulations are applicable in respect of public companies and state owned companies, and to private companies, but only where:

- there has been a transfer of 10 per cent of its issued securities (other than among related parties) within the last 24 months; or
- if the MOI of the company requires (Regulated Companies).

The Takeover Regulations are enforced by the Takeover Regulation Panel (the Panel) and, among other things, aim to ensure fairness and equal treatment to the holders of securities, the provision of information to holders of securities and the opportunity for securities holders to decide on the merits of an offer.

The Listings Requirements (the Listings Requirements) of the Johannesburg Stock Exchange (the JSE) apply to entities whose shares are listed on the JSE. These Listings Requirements also provide for the fair and equal treatment of shareholders, access to information, certain voting thresholds and pre-emptive rights.

The King IV Report on Corporate Governance for South Africa 2016, which includes, amongst other things, the King IV Code on Corporate Governance (King IV, a non-binding corporate governance code) contains several recommended practices for stakeholder relationships to protect minority shareholders. Principle 16 of King IV states that, in the execution of its governance role and responsibilities, the board of directors should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders (including shareholders) with the best interests of the organisation over time. One of the recommended practices for stakeholder relationships in Part 5.5 of King IV states that 'the board should ensure that shareholders are equitably treated, and that the interests of minority shareholders are adequately protected'.

King IV adopts an 'apply and explain' approach, which practically means that organisations are required to implement the principles – that is, take measures to achieve the principles – but must also explain why such measures were taken and their results. The 'apply and explain' approach should, by giving stakeholders more information in respect of the corporate governance of organisations, facilitate meaningful stakeholder participation.

Minority shareholders may derive protection from a number of common law rules which operate where statutory provisions are silent on a particular issue, although this is less commonly seen in practice. The general principle is that the decisions of the majority shareholder of a company will take precedence over those of the minority. The common law provides relief to minorities principally in respect of illegal transactions or those that are *ultra vires* (outside the mandate provided by the company's MOI) and where a fraud has been committed.

It is common practice for shareholders of a company to agree, contractually, in a shareholder agreement or otherwise, to additional minority protections, such as:

- the right to be involved in all major decisions regarding the company and to hold veto where applicable;
- the right to protect their share value and to prevent the dilution of their share capital;
- the right to participate in the management of the company through board representation, often ensuring that they elect at least one director to the board; and
- the right to the fair and proper distribution of profits and tag-along and drag-along rights

Importantly, to the extent any of these additional protections alter alterable provisions of the Companies Act or conflict with any provision in a company's MOI, those provisions must also be reflected in the MOI of the company.

Enforcement of these rights will depend on the nature and intended purpose of the right in question. For example, as in other jurisdictions, where the rights are intended to redress balance of power concerns, the minority shareholders may enforce some of these rights themselves. As an example, under the Companies Act, the minorities are empowered to apply to court to protect their rights as shareholders and to rectify any harm done to the securities holder or on the basis that any action is oppressive or unfairly prejudicial or unfairly disregards the interests of the shareholder. The court has the power to grant a range of remedies. Minorities are also given appraisal rights and a right to apply for court review in certain circumstances (all as discussed in more detail below). Certain other types of rules, particularly as they apply to public or regulated companies under the Takeover Regulations, have a broader legislative purpose to regulate market conduct, and are therefore more commonly enforced by the relevant regulatory authorities.

PROTECTION AGAINST DILUTION

Are there any mechanisms in your jurisdiction to protect against dilution of shareholdings? For example, are existing shareholders granted any rights on the issue of new shares in a company?

In South Africa, the board of directors of the company may issue shares of the company by an ordinary resolution of the board, provided that the shares have been authorised by the company's MOI. Shareholders are, however, afforded several protections to help ensure that the value of their shareholdings is maintained relative to other shareholders in the same company.

One such protection is the pre-emptive rights granted to existing shareholders on an issue of shares, such that third parties and/or existing shareholders cannot acquire additional shares, diluting the existing shareholders, without existing shareholders first being offered to maintain their equity percentage shareholding.

The pre-emptive rights on an issue of shares are found in section 39(2) of the Companies Act in respect of private companies or personal liability companies. The MOI of a company may restrict, negate or limit the pre-emption right contained in section 39(2) with respect to any and all classes of shares. There are also certain exceptions to these pre-emptive provisions (ie, where shares are issued (1) in terms of options or conversion rights, or (2) in the form of an instrument such that the value of the consideration cannot be realised by the company until a later date, or (3) is in the form of an agreement for future services or benefits, or (4) in the case of capitalisation shares).

In respect of JSE-listed companies, the pre-emptive rights on an issue of shares are found in section 3.30 of the Listings Requirements. The exception to this provision is where the directors consider it necessary or expedient because of legal impediments or compliance with the requirements of any regulatory body. A general issue for cash (which may not exceed 15 per cent of a company's listed securities) may be exempted from this requirement if shareholders waive this pre-emptive requirement by ordinary resolution (passed by a special majority of 75 per cent of the votes cast). A specific issue for cash may be exempt from this requirement if shareholders waive this pre-emptive requirement by ordinary resolution (also passed by a special majority of 75 per cent of the votes cast) or if the dilution is minimal and at a fair price (determined in accordance with the requirements of the Listings Requirements, with reference to a 0.25 per cent dilution).

This leads directly to the next anti-dilution protection, which is the requirement for shareholder approval for certain issuances. In addition to the approvals discussed above in respect of listed companies (75 per cent shareholder approval for a general or specific issue for cash), in accordance with the requirements of section 41 of the Companies Act, a special resolution (75 per cent shareholder approval) is required for:

- an issue to any director, officer, related or inter-related person of the company on a non-pre-emptive basis; or
- if the voting power of the class of shares that are issued will equal or exceed 30 per cent of the voting power of all shares of that class held before the issue.

Another anti-dilution protection is the requirement that securities in each class must rank *pari passu* (meaning that they are identical, carrying the same rights to voting and dividends) (section 3.29 of the Listings Requirements in respect of listed securities and section 37 of the Companies Act). Every shareholder is entitled to vote on any resolution to amend the preferences and other terms associated with that share. If the MOI of a company is amended to materially adversely alter the preferences or other terms of a class of shares, any shareholder is entitled to exercise its appraisal rights (as more fully described below) in respect of that matter.

Although the above rights and protections have general applicability to shareholders, they nonetheless operate to protect minority shareholders by requiring their input where their shareholdings are at risk of being diluted or the terms of a class of shares adjusted having the effect of dilution of the voting rights or rights to dividends in respect of that class.

RIGHTS TO APPOINT DIRECTORS

Do minority shareholders have any special rights to appoint directors to safeguard their interests? Are other protections available to minority shareholders in this context (such as general duties of directors)?

Unless provision has been made for minority shareholders to appoint, or nominate for appointment, directors in a shareholders' agreement or the MOI of a company, minority shareholders in South Africa have no specific rights to appoint directors.

It is noteworthy that section 66(4)(b) of the Companies Act stipulates that a minimum of 50 per cent of the directors of a company must be elected by shareholders by way of ordinary resolution (as opposed to appointed by way of direct appointment rights). Although this provision does not help true minority shareholders (in that the majority shareholder can easily push their nominations through), it can operate as a blocker in certain multi-shareholder scenarios.

In practice, minority shareholders would therefore typically try to include a provision in the shareholders' agreement or the MOI of the company granting the minority a right to nominate directors for election to the board, coupled with an undertaking from the other shareholders that, upon nomination, the other shareholders will vote in favour of the election of the minority shareholder. It is also possible to provide for direct appointment rights in favour of minority shareholders in the MOI. Notwithstanding the foregoing, directors are bound by their fiduciary duties, well established in terms of the common law and codified in sections 75, 76 and 77 of the Companies Act. The overarching duty is to act in the best interests of the company, and from that all other duties flow. Among others, relevant are provisions stipulating that the director may never gain or advance the interests of anyone but the company - such that a director cannot favour the shareholder that nominated them over the interests of the company. Directors are also expected to act for a proper purpose and to act in good faith.

There are also various remedies available to minority shareholders. In addition to other remedies discussed elsewhere in this note, a minority shareholder can also apply to court for an order declaring a director delinquent or under probation if they grossly abuse their position, take personal advantage or act in a manner that is grossly negligent, with wilful misconduct in relation to, or materially inconsistent with, the performance of their duties. Similarly, under the provisions of the Companies Act preventing oppressive and unfairly prejudicial behaviour (section 163), on application by a shareholder, the court has wide powers to grant a range of remedies, including appointing directors in place of or in addition to existing directors or declaring directors delinquent or under probation.

PROTECTION AGAINST TAKEOVER BIDS FOR THE COMPANY

Do minority shareholders have any protection in your jurisdiction where the company is the subject of a takeover bid?

As mentioned above, the Takeover Regulations aim, in respect of Regulated Companies, to ensure fairness and equal treatment to the holders of securities, the provision of information to holders of securities and the provision of adequate time for securities holders in the context of a takeover bid.

In terms of the Companies Act and Takeover Regulations, if an acquirer that previously held less than 35 per cent of the voting rights in a target is, as a result of the acquisition and whether acting alone or in concert, then able to exercise 35 per cent or more of the voting rights in the target, such acquisition will trigger a 'mandatory offer' to the minority shareholders. The requirement to make a mandatory offer may be waived if the holders of more than 50 per cent of the present and voting independent holders of issued shares of the target pass a so-called 'whitewash vote' in favour of such a waiver.

Conversely, if an offer has been accepted by holders of at least 90 per cent of the offeree shareholders of a class of securities, the offeror may notify the holders of the remaining securities of that class that it desires to acquire all remaining securities of that class on the same terms as the original offer (a 'squeeze out').

Shareholders are required to notify a company upon the acquisition or disposal of a beneficial interest in securities of a class of shares in a Regulated Company and the company must report that information to the Panel and other shareholders.

A scheme of arrangement requires the approval of disinterested shareholders in the form of a special resolution (75 per cent approval of those who are entitled to vote at that meeting) passed by holders of the relevant class of shares of the target company present at the shareholders meeting convened to consider the scheme (with a 25 per cent quorum requirement).

In the case of a tender offer, the approval by the target's shareholders is not required, except in the case of a partial offer for waiving the triggering of a mandatory offer (whitewash vote discussed above) or specific exemption from the provisions of the Companies Act. Insofar as the offeror is concerned, shareholder approval will only be required if it is a Category 1 transaction (being a transaction where any listed entity makes an acquisition or disposal the size of which constitutes 25 per cent or more of the market capitalisation of the acquiring entity), or if the offeror wishes to issue shares as consideration.

A sale of business which constitutes a sale of the greater part or all of the assets or undertaking of the relevant company requires 75 per cent approval by the seller's present and voting disinterested shareholders (with a 25 per cent quorum requirement). The purchase of the target's assets or undertaking by the acquiring company does not require shareholder approval (unless it is a Category 1 transaction), and the directors will have the power to make such acquisition.

A merger or amalgamation requires consent of 75 per cent of the present and voting disinterested shareholders of each of the companies involved (with a 25 per cent quorum requirement). If the consideration is to be in shares, the issue of the consideration shares will not require shareholder approval unless it is so required under the MOI of the offeror or (in the case of a listed company) it is a Category 1 transaction or if the consideration shares constitute 30 per cent or more of the issued share capital of the offeror. The approval threshold, if applicable, would be 75 per cent.

The board of directors has the power (unless the company's MOI states otherwise) to issue shares on behalf of a company, subject to certain instances where shareholder approval will still be necessary, as set out above.

Without limiting the above requirements, shareholder approval of more than 50 per cent is required for any Category 1 transaction or for any related-party transaction which constitutes more than 5 per cent of the applicable percentage ratio defined in the Listings Requirements.

The Companies Act, in section 164, provides for appraisal rights for shareholders. This provision allows dissenting minority shareholders, in the context of a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of the target, to require the target to purchase their shares at fair value (which can be determined by a court if the parties do not agree). These appraisal rights are available if:

- those dissenting minorities sent the company a notice of objection to the resolution approving that transaction in advance of the resolution being voted on; and
- voted against that resolution.

A shareholder wishing to exercise its appraisal rights, who satisfies the requirements of section 164, may make its demand by delivering written notice to the company within 20 business days after receiving notice that the resolution has been passed notwithstanding the objection by the minority. Within five business days after the later of (1) that 20 business day period, (2) the day on which the action approved by the resolution is effective or (3 the day the company receives the demand from the minorities in circumstances where the company failed to inform minorities that the resolution was passed, the company is required to send each such dissenting shareholder an offer to purchase its shares for fair value, open for acceptance for 30 business days. The company is then obliged to pay the shareholder the agreed amount within 10 business days after the shareholder accepts the offer. Should the dissenting shareholder not agree to the terms of the offer on the grounds that the offer is inadequate, such dissenting shareholder may within 30 business days of the offer being made apply to court to determine the fair value of the shares and (if appropriate) order that the fair value so determined be paid by the company. A dissenting shareholder will also have recourse should the company fail to make the offer by applying to court for an order compelling the company to make the offer in accordance with section 164(14).

A shareholder who has sent a demand in terms of section 164 has no further rights in respect of those shares other than to be paid for their fair value, unless the shareholder withdraws the demand before the company offers to purchase its shares; the company fails to make an offer and the shareholder withdraws the demand; or the company revokes the adopted resolution giving rise to the appraisal rights. Should the resolution which triggered the appraisal rights be revoked or lapse after having been approved, all rights of the dissenting shareholder are immediately reinstated, provided that the dissenting shareholder does not accept the offer to have its shares repurchased by the company. Consequently, section 164(9) does not cause the dissenting shareholder to lose its shareholder status, but rather removes the other trappings and privileges associated with being a shareholder while the dissenting shareholder exercises its appraisal rights.[1]

The case of *First National Nominees (Pty) Limited v Capital Appreciation Limited*[2] dealt with a buy-back falling within the provisions of section 48(8) and whether the dissenting shareholders were able to exercise section 164 appraisal rights. The court held that a section 48(8) transaction is not a section

[1] *Loest v Gendac and Another* 2017 (4) SA 187 (GP)
[2] 2021 (4) SA 516 (GJ) (5 February 2021)

114 scheme of arrangement, but it is subject to the procedural requirements of sections 114 and 115. The procedural requirements include section 115(8), which entitles shareholders to exercise appraisal rights in terms of section 164.

The section 164 appraisal rights for dissenting shareholders also apply in instances of a holding company whose subsidiary has implemented a transaction disposing of all or the greater part of its assets or undertaking. In the case of *Cilliers v LA Concorde Holdings Limited and Others*, the court held that, in determining whether appraisal rights established in terms of section 164 of the Companies Act are afforded to shareholders of a holding company or only to the shareholders of its subsidiary disposing of its assets, the court preferred a plain language reading of the phrase ‘the holder of any voting rights in a company’ contained in section 115(8) of the Companies Act. The court averred that if the legislature intended the meaning to be limited to ‘the holder of voting rights in the disposing company’, it would have simply said so. A shareholder need not hold shares in the subsidiary to be afforded appraisal rights in respect of the subsidiary, their shares in the holding company secure such rights.[3]

Also, in accordance with the provisions of section 115 of the Companies Act, if 15 per cent or more of shareholders vote against a resolution proposed for implementing a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of the target, any dissenting shareholder may, within five days of the resolution being passed, require the company, at its expense, to obtain court approval before implementing the resolution. Even if less than 15 per cent vote against, a shareholder who can satisfy a court that there is a *prima facie* case for review may, within 10 days, apply to court for a review of the resolution. Such shareholder should first have indicated prior to the meeting that it intended voting against such resolution and subsequently indeed voted against such resolution. A court may only set aside the resolution if it is satisfied that there is manifest unfairness to shareholders or a material procedural irregularity.

[3] (23029/2016) [2018] ZAW- CHC 68

ACTIONS AND SEEKING REMEDIES ON BEHALF OF THE COMPANY

Are shareholders in your jurisdiction able to bring actions and seek remedies on behalf of the company? For example, is there any mechanism for a judicial or other official representative to oversee or intervene in the management of the company?

The Companies Act, in section 165, abolishes the common law derivative action and enables a shareholder (among other stakeholders) to bring proceedings in the name of and on behalf of the company to protect the legal interests of the company. Unless the situation satisfies the requirements of the Companies Act regarding potential prejudice and harm, the shareholder must first serve a demand on the company to commence the proceedings in its own name.

From a process perspective, the company may, within 15 business days of receipt of the demand, apply to court to set aside the demand on the ground that it is vexatious, frivolous or without merit. Where the demand is not set aside, the company is required to appoint an independent and impartial person or committee to investigate the demand.

Within 60 business days after being served with a demand (or such longer time as the court, on application by the company, may permit), the company must either initiate or continue legal proceedings or take related steps to protect its interests as contemplated in the demand or serve a notice to the person who made the demand, refusing to comply with it.

In certain circumstances (including where the company has refused to comply with the written demand) and where a court considers it appropriate, the person having made the initial demand may apply to court to institute or continue proceedings in the name and on behalf of the company.

Other mechanisms which allow for intervention in the management of the company are the section 161 rights as a securities holder and section 163 rights against oppressive and prejudicial conduct (discussed below).

Pursuant to section 161 of the Companies Act, a shareholder may apply to court for an order necessary to protect any right or rectify any harm done to the securities holder by (1) the company as a consequence of an act or omission that contravened the Companies Act or MOI or (2) the directors to the extent they are liable for a breach of fiduciary duties.

This section was recently tested in the case of *Du Plooy N.O and Others v De Hollandsche Molen Share Block Ltd and Another*,[4] where parties were ordered to enter into an agreement, failing which the matter would be decided by an arbitrator, whose decision would be final and binding.

Similarly, pursuant to section 163 of the Companies Act, a shareholder may apply to court for relief from oppressive and unfairly prejudicial conduct of the company or a related person. The court is allowed a wide range of remedies it considers fit, including: restraining the conduct, appointing a liquidator or placing the company under supervision or business rescue; appointing directors in place of or in addition to other directors or declaring a person delinquent or under probation; setting aside transactions, and so on . Although this list of remedies is non-exhaustive (*Grancy Property Limited v Manala and Others* 2015 (3) SA 313 (SCA)), in practice this section has very limited application and is only applied in exceptional circumstances.

[4] 2016 JOL 35101 WCC (Western Cape High Court)

The recent case of *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*[5] held that section 218(2) of the Companies Act does not provide a basis for an action by individual shareholders against the directors of a company for damages related to the diminution of the value of their shares caused by a director's contravention of any provisions of the Companies Act. Such a loss constitutes a 'reflective loss' in terms of common law, which cannot be claimed by shareholders against the directors. A shareholder cannot recover damages merely because the company in which they hold shares has suffered damage. The company is the correct party to sue for such damages. section 218(2) of the Companies Act is restricted in its application as it requires that a particular person must have suffered damage as a result of a particular contravention.

The case of *Dorothea De Bruyn v Steinhoff International Holdings N.V. and 41 others*[vi] (the Steinhoff judgment) dealt with the first shareholder class action brought for certification before the South African courts. Following the collapse of Steinhoff's share price in late December 2017, a retired pensioner sought authorisation to represent shareholders in a class action to hold, among others, certain Steinhoff companies and their directors liable for breaches of statutory and common law duties of care. The shareholders alleged that the companies, through their directors, had engaged in unlawful transactions the effect of which was to overstate their assets, income and profits, understate their liabilities, and render their financial statements non-compliant with prescribed reporting standards. They sought to hold the companies and directors liable (1) at common law, in delict/tort, for losses caused to shareholders for negligent misstatements in the financial statements, and (2) under the Companies Act, on the basis that contraventions of statutory duty by the companies and their directors caused loss to shareholders, and gave rise to liability in terms of section 218(2) or section 20(6) of the Companies Act for the damages suffered by shareholders. We summarise the court's treatment in the Steinhoff judgment of each claim below.

Common law claim
For the shareholders to have a claim in delict/tort, wrongfulness had to be established. Negligent misstatements that cause pure economic loss are a category of case where wrongfulness is recognised if the plaintiff can demonstrate that a legally recognised right or interest has been infringed. In considering whether the shareholders have a legally recognised right or interest that had been infringed by the Steinhoff companies and its directors, the court looked to fundamental principles of company law, and stated that it is a fundamental principle of South African company law that, in general, directors owe fiduciary duties to the company and *not* to its shareholders.

While it is possible that directors may owe (additional) fiduciary duties to shareholders in special circumstances, namely where there is some special factual relationship subsisting between the directors and the shareholders, there is no general fiduciary duty owed by directors to shareholders of a company. The court found that that there was no basis on the shareholders' case to find that the Steinhoff directors or the companies, by virtue of some special relationship, owed any fiduciary duties or duty of care to the shareholders. Therefore, the shareholders lacked a cause of action because, absent a finding of wrongfulness, there could be no delict/tort.

Statutory claims
Section 218(2) of the Companies Act provides 'any person who contravenes any provision of the [Companies] Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.' In respect of this, the court held that:

- section 218(2) should not be interpreted literally, as that would lead to incurable contradictions when considered in the light of the other provisions of the Companies Act; and

[5] (Case no 1423/2018) [2020] ZASCA 83
[vi] (29290/2018) [2020] ZAGPJHC 145

- what section 218(2) does is recognise that loss or damage may arise from contraventions of the Companies Act and confer a right of action.

Questions concerning who enjoys the right of action, what the right consists of, and against whom the right may be exercised, must be resolved by reference to the substantive provisions of the Companies Act implicated by the particular contravention – bearing in mind that the Companies Act attaches different regimes of liability to different contraventions of the Act.

Section 20(6) of the Companies Act provides:

> 'Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with: (a) the [Companies] Act; or (b) a limitation, restriction or qualification contemplated in this section [20], unless that action has been ratified by the shareholders in terms of subsection (2).'

Section 20(6) does not specify whether a shareholder has a claim for damages suffered by the shareholder(s) or the company. Having regard to section 20 as a whole,[6] the court held that section 20(6) imposes liability on persons who cause loss to the company, and requires those who have caused the company to act *ultra vires* or unlawfully to make good to the company (by way of damages) the loss they have caused to the company. Section 20(6) does not give rise to liability for the damages that shareholders may have suffered by reason of the unlawful or *ultra vires* actions of the Steinhoff companies. The company may be compensated for its loss at the instance of the shareholders, which would indirectly benefit the shareholders.

In weighing the various factors that are to be considered in an application for certification,[7] Unterhalter J ultimately held that, as a matter of law, the class action failed to raise a triable issue: as pleaded it did not disclose a cause of action. Therefore, whatever the virtues of the class action, certification could not be granted.

[6] Section 20 is broadly concerned with the validity of company actions. It recognises that persons may cause a company to act beyond its powers or some other limitation in its constitutional documents, and/or unlawfully in contravention of the Companies Act and sets out various remedial options available to shareholders and other constituencies (including directors and prescribed officers) in those circumstances. Section 20(6) confers a right of action for damages on each shareholder of a company against a person who, intentionally, fraudulently or through gross negligence, caused the company to do anything inconsistent with either the Companies Act or a limitation on the purposes, powers or activities of the company in its constitutional documents (the latter, *ultra vires* actions).

[7] In *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) at para 26, the Supreme Court of Appeal set out factors that should be weighed in deciding whether to certify a class action: the existence of a class identifiable by reference to objective criteria; the proposed class representative is suitable to conduct the action and represent the class; a cause of action raising a triable issue; the right to relief requires the determination of issues of fact or law, or both, common to all members of the class; the relief sought or damages claimed flow from the cause of action and are ascertainable and capable of determination; where damages are claimed, there is a procedure by which to allocate the damages to members of the class given the composition of the class and the nature of the proposed action; and that a class action is the most appropriate means by which the claims of the class may be determined. In *Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC)* at paras 34–40, the Constitutional Court held that the above factors are not prerequisites for certification but are are considerations to be weighed under the overarching principle of what is required by the interests of justice. And as Unterhalter J put it in *Steinhoff*, at para 25: '[F]actors relevant to certification may weigh in different ways. Certain factors may weigh with the certification court to incline the decision one way or another. Other factors may be so weighty that the scales tip decisively. Every factor is to be weighed, and none displaces the ultimate exercise of weighing all in the balance to determine where the interests of justice lie. But that does not mean that a factor in a particular case may weigh so heavily that it points clearly to what the interests of justice require.'

RIGHTS TO PARTICIPATE IN DECISION-MAKING

To what extent do minority shareholders have rights to participate in the decision-making of companies in your jurisdiction?

The business and affairs of a company are managed by or under the direction of the board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Companies Act or the MOI provides otherwise.

Certain matters do require shareholder approval by way of an ordinary resolution (supported by more than 50 per cent of the voting rights exercised on the resolution) or a special resolution (supported by at least 75 per cent of the voting rights exercised on the resolution). These thresholds may be adjusted in the MOI of the company (upwards for an ordinary resolution and up or down for a special resolution), provided that there is always a 10 per cent margin between the lowest threshold for passing a special resolution and the highest threshold for passing an ordinary resolution.

Examples of matters that require ordinary resolutions include:

- removal of a director;
- ratification of resolutions of the board in contravention of the provisions of the Companies Act regarding personal financial interest;
- approving rules by the board; and
- appointment of an auditor and approval of financials (where required).

The Companies Act contains a list of matters requiring a special resolution but also permits the inclusion of any other matter in the MOI of the company. Examples of matters requiring a special resolution have been set out in the table below. It is common practice for minorities to request additional reserved matters in the MOI in respect of which the consent of the minority would be required.

In certain instances, the Companies Act also imposes additional approval requirements or restrictions. For example, for the purpose of approving a waiver of notice periods or ratification of defects in a notice, the unanimous approval of all of the shareholders is required. For the purpose of any resolutions to be passed in terms of section 115 (ie proposals to dispose of all or a greater part of the assets or undertakings of a company, a merger or amalgamation or a scheme of arrangement and certain buybacks), not only must the resolution be approved at a meeting (affording minorities an opportunity to attend and ask questions) but only the votes of disinterested shareholders will be taken into consideration (ie any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in the calculation). Similarly, in respect of companies listed on the JSE, votes of related parties and their associates will not be taken into account in relation to any resolution in connection with a related party transaction.

A shareholders meeting must be called if 10 per cent of all voting rights entitled to vote on a matter submit a demand for a shareholders meeting (or such lower threshold as stipulated in the MOI of the company), unless a court finds the demand frivolous or vexatious. Any two shareholders may propose a resolution be submitted to shareholders for consideration. All shareholders are entitled to notice of the meeting.

A resolution may not be taken at a shareholder meeting on a matter unless (1) persons are present to exercise in aggregate at least 25 per cent of all voting rights entitled to be exercised in respect of that matter (subject to a lower or higher threshold stipulated in the MOI of the company); and (2) if the company has more than two shareholders, at least three shareholders must be present. At an adjourned meeting, adjourned for lack of quorum, shareholders present will constitute a quorum.

RIGHTS WHEN A COMPANY IS EXPERIENCING FINANCIAL DIFFICULTIES

Do minority shareholders have any particular rights or protections when a company is experiencing financial difficulties? For example, are they able to demand that the company be wound up?

Under South African law, there are three possible methods in which a company can be wound up, namely:

- deregistration (in the case of a dormant entity);
- voluntary winding up by way of a special resolution at the instance of the shareholders, either in terms of a solvent (member's) winding up; or an insolvent (creditors') winding up; or
- a compulsory winding up by means of an application to court.

The solvent (members') winding up (where the company has no liabilities or has furnished required security for payment of its debts with the Master of the High Court) is regulated by the Companies Act, which entitles shareholders of a company, with a special resolution (75 per cent majority vote) to resolve to wind-up the company.

In the case of an insolvent (creditors') winding up (where the company has actual or contingent liabilities), notwithstanding the repeal of the Companies Act 61 of 1973 (the 1973 Act), such a voluntary winding up still remains regulated by that 1973 Act, which also allows the shareholders of a company, by special resolution, to resolve to wind up the company by way of a creditor's winding up. When the shareholders of a company pass a special resolution for the winding up of the company in terms of an insolvent (creditor's) voluntary winding up, the liquidator is appointed at the instance of the creditors and their rights are protected by the liquidator who winds up the company, subject to the directives given by the creditors given at meetings of creditors and not the directions of the shareholders. Neither of these remedies are particularly helpful to minorities.

A shareholder (who has held shares for a period of at least six months) of a company in financial difficulty may also apply to court for an order placing the company into liquidation in terms of section 344(h) of the 1973 Act on the grounds that it is just and equitable to have the company wound up. The courts would not lightly grant a winding-up order, and have established non-exhaustive criteria with which a shareholder applying for the winding up of a company on the basis of justice and equity must comply.

The applicant must, for instance, have come to court with clean hands. The applicant must show the circumstances that would justify the interference of the court in the domestic matters of the company, and to order the winding up of the company in spite of the fact that less than the required 75 per cent majority of shareholders are in favour of winding up. The court would not wind up a company just to relieve a shareholder from obligations it has freely undertaken, solely because it takes a pessimistic view of the company or wants its money back. Where some other remedy is available to the shareholder, the court must be satisfied that such shareholder is not unreasonably seeking to have a company wound up instead of pursuing the other remedy. It must be proved to the satisfaction of the court that the shareholder would be prejudiced if the winding up order is refused. Animosity can persuade the court to grant a winding up order on just and equitable grounds, provided the applicant must not have been responsible for the situation itself. A mere deadlock on the board or shareholder level would not *per se* entitle a shareholder to a winding up order of a company in financial difficulties. However, a solvent company may be wound up merely on the basis of the existence of a deadlock.

Another option would be an application for business rescue. Business rescue has been introduced into South Africa to facilitate the rehabilitation of a company that is financially distressed by providing for:

- temporary supervision of the company and the management of its affairs, business and property;
- a temporary moratorium on the rights of claimants against the company and property in its possession; and
- the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, where not possible, results in a better return for creditors and shareholders.

Although generally business rescue is initiated by the board, shareholders could apply to court as an 'affected person' for the initiation of business rescue proceedings. Once business rescue proceedings are initiated the business rescue practitioner takes control of the entire process.

The court would need to be satisfied of the following factors prior to making an order for the placing of the company under supervision and the commencement of business rescue proceedings:

- the company is financially distressed;
- the company has defaulted in its contractual or public regulation obligation; or
- where it is just and equitable to have the company placed under supervision and have the business rescue proceedings commenced.

The shareholder must also satisfy the court that the company is capable of being rescued.

One of the remedies that a court has in the case of an application by a shareholder in terms of section 163 (discussed above) for oppressive and unfairly prejudicial conduct would be for the court to grant an order appointing a liquidator, if the company appears to be insolvent, or placing the company under supervision and commencing business rescue proceedings (if applicable).

RIGHTS ENFORCEABLE AGAINST OTHER SHAREHOLDERS

Do minority shareholders have any rights or protections which are enforceable against other shareholders; for example, where the majority of shareholders act in contravention of the company's articles of association?

The primary remedies available to minority shareholders, enforceable against other shareholders, include:

- the right to apply to court to enforce its rights as a securities holder (section 161);
- to prevent oppressive and prejudicial conduct (section 163);
- statutory derivative actions to enforce a company's rights if the company fails to do so (section 165); or
- a court review in the case of procedural irregularities (section 115).

The Companies Act also expressly makes provision for a shareholder to make a claim for damages against any other person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Companies Act or a limitation, restriction or qualification contained in the MOI of the company (section 20), or generally for any contravention of the Companies Act (section 218).

Finally, any person is entitled in terms of the Companies Act to initiate a complaint with the relevant regulator (ie the CIPC or the Panel) for any conduct that is inconsistent with the Companies Act or the MOI of the company. The regulator is empowered to excuse the conduct, refer the matter to the Companies Tribunal, court or the National Prosecuting Authority or issue a compliance notice. A court may, on application by the CIPC or the Panel, impose certain fines.

SUMMARY OF RIGHTS

Below is a table providing a brief summary of the rights of minority shareholders in South Africa, organised according to the percentage threshold at which the various protections become available.

Shareholding (per cent)	Description	Reference
More than 25 per cent *(or such other threshold as stipulated in the MOI of the company)*	Shareholders with more than 25 per cent of the company's voting rights are able to block special resolutions on the following issues: • amending the MOI of the company; • ratification of action by the company which would otherwise be inconsistent with the MOI; • approving the issue of shares to directors or related persons or in excess of 30 per cent; • authorising the provision of financial assistance for the subscription of securities or to directors or related persons; • authorising buy-backs from related persons or in excess of 5 per cent; • authorising payment of remuneration to directors; • approving winding-up the company; • approving deregistration (upon transfer of the company's registration to a foreign jurisdiction); • fundamental transactions (i.e. a disposal of the whole or greater part of the company, a merger or a scheme); • revoking a previously adopted resolution which gave rise to appraisal rights of minorities; and • any other matter identified as requiring a special resolution in terms of the MOI of the company. This 75 per cent threshold for a special resolution may be altered in the MOI of a company.	Section 65(11), Companies Act 2008
15 per cent	If a resolution for a fundamental transaction is opposed by 15 per cent of the voting rights exercised on the resolution (excluding interested shareholders), the resolution may not be implemented without the approval of court if, within five business days, a person who voted against the resolution requires the company to seek court approval. Relief will only be granted if the resolution is manifestly unfair or tainted with conflict or irregularity.	Section 115, Companies Act 2008

Shareholding (per cent)	Description	Reference
10 per cent *(or such other threshold as stipulated in the MOI of the company)*	Shareholders holding at least 10 per cent of the voting rights entitled to be exercised in relation to a matter can require that a meeting of the shareholders is convened. This threshold may be altered in the MOI. If the meeting is not called by the company after the request is submitted by the shareholders, the shareholders can apply to court for an order requiring the company to convene a meeting. Any two shareholders may propose a resolution to be put before the shareholders.	Sections 61 and 65, Companies Act 2008
One share	A shareholders meeting can be held notwithstanding defective notice, provided that all shareholders entitled to vote on the matter at hand are present and all vote to waive notice for the meeting. This waiver may be blocked by a single shareholder.	Section 62, Companies Act 2008
	A shareholder (who has held their shares for at least six months) may apply to the court to seek a winding up of the company. Generally, the court will only make an order to wind up a company where the applicant shareholders have no other remedies available.	Companies Act 61 of 1973, read with the Companies Act 2008
	Any shareholder has the right to inspect information such as: • the MOI: • register of directors; • records of shareholder resolutions and minutes; annual financial statements; • the securities register of the company; and • any other information stipulated by the MOI of the company.	Section 26(1)(a), Companies Act 2008
	Any shareholder may bring a claim (known as a 'derivative' claim).	Section 165, Companies Act 2008
	Any shareholder may apply to the court on the basis that an action (or proposed action) of the company, or a director or related person, is oppressive or unfairly prejudicial to or unfairly disregards the interests of the shareholder. The court has wide powers to grant a range of remedies.	Section 163, Companies Act 2008

Shareholding (per cent)	Description	Reference
	Any shareholder may make an application to court to protect its rights as a securities holder and to rectify any harm done to the securities holder.	Section 161, Companies Act 2008
	Any shareholder may apply to court for an order declaring a person delinquent or under probation.	Section 162, Companies Act 2008
	In accordance with the 'appraisal rights' of the shareholders, any shareholder may give written notice to a company objecting to any resolution to • amend the MOI of the company in a manner materially adverse to the rights or interests of holders of a class of shares; or • enter into a fundamental transaction (ie a disposal of the whole or greater part of assets or undertakings of the company, a merger or a scheme). If that shareholder then votes against the resolution and the resolution is still passed, the shareholder may demand that the company pay the shareholder the fair value for its shares pursuant to its appraisal rights.	Section 164, Companies Act 2008
	Any shareholder may apply to court for an appropriate order to restrain the company from doing anything inconsistent with the Companies Act or the MOI.	Sections 20 and 218, Companies Act 2008
	Any shareholder may file a complaint to the CIPC or Panel alleging that a person acted in a manner inconsistent with the Companies Act or MOI.	Section 168, Companies Act 2008
	Where 35 per cent of the shares in a regulated company are acquired by a purchaser, that purchaser is then subject to the mandatory offer provision. They are taken as having offered to purchase the remaining shares in the company on the same terms.	Section 123, Companies Act 2008
	If a company has ceased to trade and been struck off the register, any interested party may apply to the CIPC for the company to be restored to the register.	Section 82(4), Companies Act 2008